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IN THE

Supreme Court of the United States

No. 731

CITIZENS UTILITIES COMPANY, NEWPORT ELECTRIC DIVISION,

Petitioner,

v.

CHARLES S. PROUTY, GENEVIEVE PROUTY, JOHN A. PROUTY, ELSIE OR PROUTY MALLORY and THIRD NATIONAL BANK & TRUST COMPANY,

Respondents.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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vs.

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Respondent's contention (Brief, p. 7) concerning the jurisdiction of this Court overlooks the fact that there is brought into question the propriety of the construction and application by the Supreme Court of the State of Vermont of a statute of the United States, i.e., the Federal Power Act (Petition, Point 2, pp. 18 et seq.). In such a case, this Court has jurisdiction to review by certiorari (see citations, Petition, p. 2).

Respondent asserts (Brief, p. 13) that Petitioner, having invoked the Vermont statute, is "unreasonable and wrong" in claiming that the Vermont tribunals are not authorized to decide questions relating to their own jurisdiction because of the Federal Power Act. It is submitted that there is nothing either "unreasonable" or "wrong" in Petitioner's contention, inasmuch as the Court's error

is claimed to be not in its construction of the Vermont statute, but in its construction of the Federal Power Act.

Throughout their brief (pp. 4, 5, 6, 8, 12, 13), Respondents assert that the record contains nothing to "suggest" that Petitioner had complied with the statutory requirements of the State of Vermont that it have a Certificate of Public Good, and it is stated further (pp. 4, 5) that Petitioner evidently intended to create the "erroneous and utterly misleading" impression that the development in question was of such "antiquity" that Petitioner was not required to comply with the statute.

The answer to this gratuitous charge is found in the Report of the Public Service Commission of the State of Vermont, in which the Commission said (Appendix C, p. 25a, italics ours):

> "The Petitioner also claims that the Petitioner does not possess a certificate of public good authorizing the project. In determining whether there is a certificate, 10 V.S.A. Sec. 702 which provides that a permit is required was not passed until 1929. Thus, most of the original project here involved was constructed before there was any such statutory requirement. It was not until 1945, that a company in case of dams was required to show a certificate before proceeding in eminent domain cases under Sec. 111(a), see 1945, No. 138 Sec. 6. In Docket 2680, dated September 27, 1954, the Petitioner did secure authorization under said section to make certain modifications on the dam and said modifications were permitted. Accordingly, so far as the record stands, no authorization was needed for the original dam since it was in existence before the time a permit was required. There have been no alterations appearing in the record which would require additional authorization other

than those already granted. *Therefore, we find that the Petitioner does possess all authorization required under Sec. 111(a).*"

This finding of the Public Service Commission was not disturbed by the Supreme Court of Vermont. As noted by the Chief Judge in his dissent (Appendix B, p. 16a):

> "The opinion of the majority does not rest on any error growing out of this finding."

Respondent-states (Brief, p. 13) that it would have been "improper" for the Federal Power Commission to "interfere" with proceedings before the Public Service Commission. Nowhere has Petitioner suggested that the Federal Power Commission should have attempted to exercise any jurisdiction over the Public Service Commission. The Federal Power Act leaves the Federal Power Commission free to stand by, as it did here for, at least twenty-nine years (Petition, p. 8), and permit state agencies to exercise jurisdiction, subject, of course, to the power of the Commission to step in and exercise an overriding jurisdiction whenever, and to the extent, it might deem it advisable to do so. It is clear, we submit, that the Federal Power Commission did not intend to intervene here to the extent of having Petitioner discontinue the condemnation proceeding it was then prosecuting before the Vermont Public Service Commission. If the Federal Power Commission had so intended, it would not have extended Petitioner's time to apply for a license for a period which, as appears from the terms of the order granting the extension, might continue for a period of years (Petition, p. 9), while leaving Citizens free to continue operating its project, and not directing it to dis-

continue its pending condemnation proceeding, in the meantime.* The reason is obvious: the condemnation would not create any new operation, or in any respect affect the existing one; it would merely effectuate a contract provision for the continued use by Citizens, *as owner*, of property which it and its predecessor had used for the self-same purposes, *as tenants*, since prior to the making of the contract some thirty years previously. Naturally, the Federal Power Commission was not concerned with such a proceeding, and was content to have it continue to its conclusion before the State agency where it had long been pending.

Dated: New York, New York
March 23, 1962.

Respectfully submitted,

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* The statement in the opinion of the Vermont Supreme Court that Petitioner did not have the license under the Federal Power Act "which it was ordered to obtain by the Authority" (Appendix B, p. 52a) overlooks the fact that Petitioner's time to apply for the license had been so extended and was still unexpired.